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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

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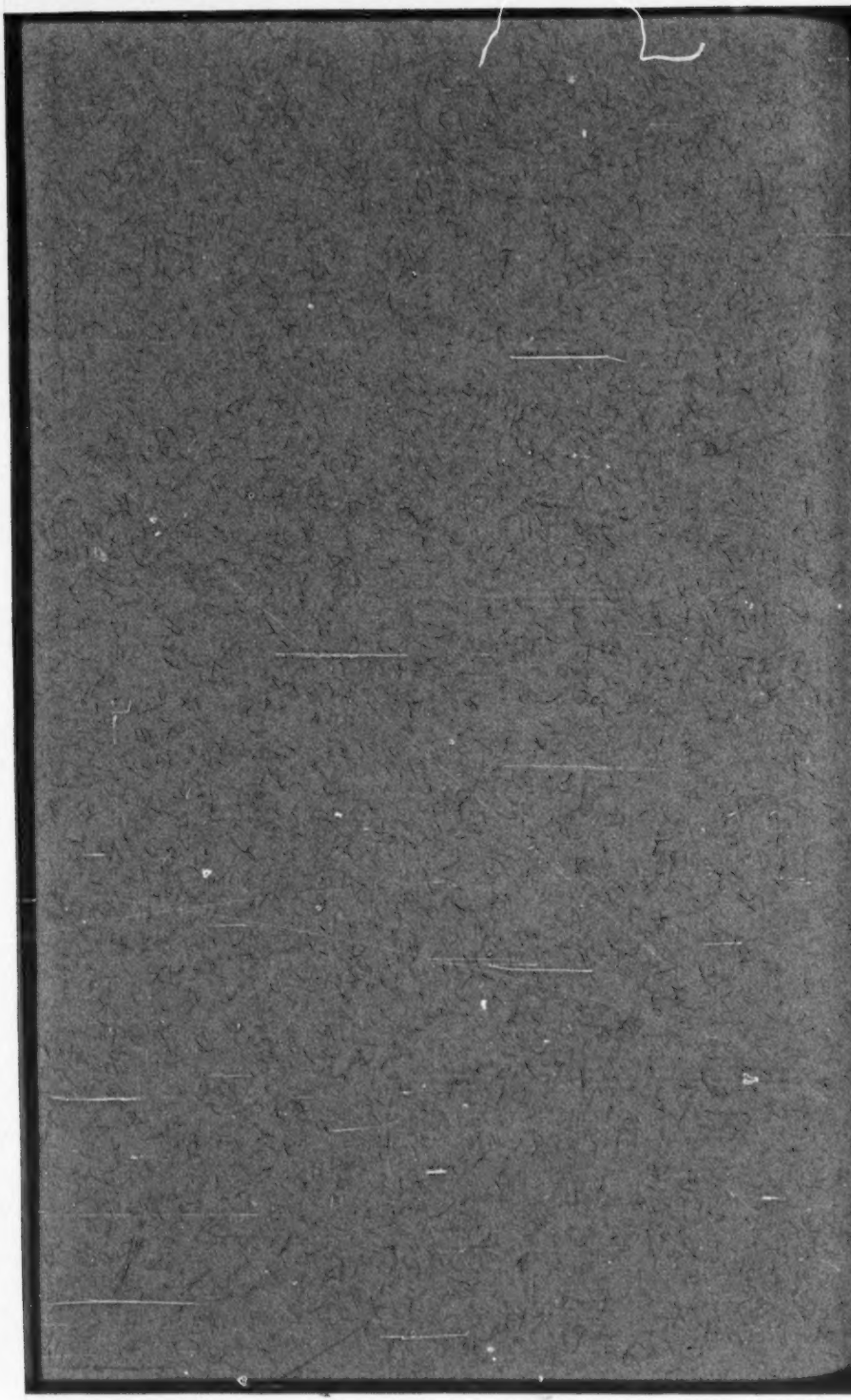

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Petitioner respectfully files this reply to the Government's brief in opposition to petition for certiorari.

A. THE INJUSTICE AND MOUNTING PREJUDICE OF THE MISCONDUCT AND ERRORS COMPLAINED OF

We regret that the Government has sought to oppose consideration of this case by the Court, particularly in view of the serious prosecution misconduct—

c. Not once in a 27-page brief does the Government refer to the significant leniency recommendation of the jury. This recommendation was not provided for in the instruction. It shows that the jury was uneasy in its verdict. It shows that in all probability the jury would—and at the very least the jury might well—have acquitted petitioner, if it had had the knowledge kept out of the trial by the prosecutor.

Petitioner's substantial rights were thus clearly and directly affected. It cannot fairly be said that the jury's verdict was not substantially swayed by the misconduct and errors complained of. See *Kotteakos* v. *United States*, 328 U.S. 750, 764:

> "(The question is) what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> • • •
>
> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error."

The significance of the jury's recommendation appears from *White* v. *United States*, 216 F.2d 1, 7 (C.A. 5th):

> "The jury in its verdict recommended clemency. We cannot say that, if this letter had been before the jury, it might not have returned a verdict for the defendant. See *Kotteakos* v. *United States*, 328 U.S. 750, 764, • • •"

We turn now to the point-by-point refutation of the Government's brief. We regard divers points in that brief as specious, delusory and even (e.g., par 1, pp. 13-14 *infra*) misleading. They blur and distract attention from the

essential and basic injustice. We are aware of the risk that this distraction may be compounded by the very nature of a point-by-point reply. But we feel such a reply is now necessary in order to reassure the Court that it may appropriately proceed to the consideration of the fundamental questions of justice and criminal administration which this case presents.

B. MISCONDUCT IN SUMMATION

1. The curious structure of the Government's brief can not conceal this critical fact: The prosecutor obtained the conviction on a false and misleading basis. Mr. Schnacke argued to the jury that petitioner's alleged cash shipments to Gersh by ordinary mail were "fantastic," and rested on his "unsupported word". (Pet. 21.) Yet it is now conceded (Govt. Br., 16) that Mr. Schnacke had not only studied the record of the first trial and read Gersh's testimony but had also examined Gersh's bank records corroborating petitioner's cash shipments to Gersh.

a. The prosecutor obtained the conviction on a spurious issue,—whether cash was sent to Gersh. He thereby avoided the difficult burden of proving to the jury beyond a reasonable doubt that the transfers which had occurred were not in the amounts and for the purposes stated by petitioner.

The court of appeals had reversed the first conviction because of the error in excluding evidence offered by defendant which would be of "weight in determining the question whether Wolcher or Gersh was telling the truth with respect to why the money was sent by Wolcher." (Pet. Appx. p. 15a). The prosecutor's burden at the second trial would be increased in the light of the evidence previously excluded.

To obtain a conviction he first resisted and frustrated the introduction of the documentary evidence corrobo-

rating petitioner. He then was able to present an apparently persuasive but wholly fictitious issue to the court and jury.

b. The Government poses a false dilemma in saying (Br. 22) that petitioner would have been the first to object if the prosecutor had traveled outside the record and therefore cannot complain if the prosecutor rested on the record as made. It might just as well be argued that a prosecutor may knowingly rely on testimony he knows is perjured when there is no evidence of perjury in the record. The answer is simple. Of course a prosecutor must place in the record all the evidence he relies on to secure a conviction. But he is also required to respect facts and documents established in the Government's files, though outside the record as made, to the extent that they corroborate the defendant and tend to establish innocence rather than guilt.

In a sense this is a double burden. But it is the Government's duty not only to prosecute but also to prosecute fairly, not only to present the evidence of guilt but also to assure a fair trial. The overriding interest of the Government is to win the case but that justice shall be done.

c. The Government repeats the arguments made below that defendant himself attacked Gersh's veracity and that the prosecution was not bound to accept Gersh's testimony "as gospel truth in all respects." (Br., 21.) The Government studiously ignores the critical point that petitioner is not relying on the mere testimony of Gersh. It is the documentary bank records which are the important corroboration of petitioner. When Gersh testified that he received money from petitioner he was testifying against his own interest, and he only did so to the extent he was in effect compelled by his own bank records corroborating petitioner. The Government argues as if the jury must believe the whole or none of Gersh's testimony, which accords neither with law or human experience.

2. It is hard to believe that the Government actually contends that this misconduct had no effect upon the jury.

The Government says (Br. 19) that petitioner is exaggerating the importance of this passage of Mr. Schnacke's summation, that Mr. Schnacke had other arguments to show that petitioner made profits on his black market transactions. Petitioner did not deny profits on sales of whiskey to outsiders; the question is whether these exceed the overages absorbed on whiskey resold at ceiling to taverns owned by petitioner and his relatives.[1]

The Government cannot in fairness contend that this dereliction was de minimis. The trial judge himself confirmed the emphasis and importance of this part of Mr. Schnacke's summation. In his charge he stated that the heart of the Government's contention was "that the defendant's account of sending large amounts in cash through the mail and otherwise to someone in the East is a story that is fabricated." (R. 483.)

Emphasis and apparent reasonableness, rather than length, make an argument telling. Mr. Schnacke argued that petitioner's "unsupported word" as to "fantastic" cash transfers through the mails was fabricated. This was obviously intended to have and undoubtedly did have a profound impact on the jury, which was kept in ignorance of Mr. Schnacke's knowledge of the corroboratory bank records.

When the prosecutor's method of persuading the jury to render a guilty verdict includes overreaching in presenting the facts, "the government, upon appeal, will not ordinarily be heard to say that the methods which were used did not

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[1] Petitioner claimed the overages in receipts on sales to outsiders only equalled the overages absorbed on whiskey supplied at ceiling price,—and below actual purchase cost—to the taverns owned by petitioner and his relatives.

The Government brief states (p. 19) that less than one-sixth of the purchased whiskey was routed to such taverns. The figures are 1500 out of 5138 cases (Govt. Br. 5), which is almost 30 percent.

If petitioner had to pay an overage of $20-$25 a case over the ceiling there was no profit on the whiskey transactions overall. (Pet. 9-11.)

portant because of alleged technical oversight in the first trial.

3. The Government begs the question in its argument (Br. 16) that although Mr. Schnacke (and Appling) had knowledge of the records, they should properly have been authenticated by Gersh.

The Government acquired these records in its protracted investigation and in the earlier trial the Government itself sponsored them as Gersh's authentic bank records. In these circumstances was it incumbent upon defense counsel to anticipate that he would be required to authenticate them as if to an uninformed adversary? Was he not justified in assuming that authenticity would be conceded, and that he might properly have recourse to the Treasury agent in charge and to the prosecuting attorney to identify these indisputably authentic copies of Gersh's bank records?

The Government's brief states that Appling was a special agent (Br. 8) but fails to note that he was the special agent in charge of the investigation of Wolcher (R. 35), an investigation lasting many months.[3] Under Treasury practice it was his function to supervise the entire investigation and to make a recommendation on the basis of all the evidence obtained as to whether or not a criminal prosecution was appropriate. Appling was competent to testify concerning the documentation corroborating petitioner which was acquired by the Treasury in the course of its investigation.

4. But even if Mr. Schnacke could properly have raised the objection of lack of capacity to authenticate the records, the fact that instead he resorted to misleading statements and maneuvers was improper and prejudicial. Mr. Schnacke did not say at the trial what the Government says in its brief, that although he (and Appling) had

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[3] His report was completed October 1, 1949 (R. 42). He was assigned to the case in June 1947. (R. No. 12992, p. 338.)

knowledge of these records they should properly have been authenticated by Gersh. His statement was very different, that he had no knowledge whatever of the bank records, because he was not present at the first trial. Mr. Schnacke's statement was for the purpose of stopping at the threshold an inquiry the prosecuting attorney thought, indeed knew, would be helpful to defense. It was of a piece with his objection to questions asked of Appling concerning the Cash Box bank record, "that this whole inquiry is immaterial." (R. 466.)

Mr. Schnacke knew better than anyone how material these bank records were in view of his plan to attack petitioner's "unsupported word" as a fantastic fabrication in his summation.

The Government brief seeks to justify Mr. Schnacke's objection, on the ground that what Mr. Schnacke really meant was that the subject matter of the questions asked of Appling was obviously material but that the evidence properly could be developed only through Gersh as a witness. (Govt. Br. 16-17.)

If Mr. Schnacke had said that in the trial court, could he have sensibly opposed petitioner's request to subpena Gersh? But again, the record shows that Mr. Schnacke did not object to Appling's competence but to materiality.

This shifting around to what the prosecuting attorney might have said or contended is suggestive of *Cole* v. *Arkansas*, 336 U.S. 196. There the Court held that it was unfair and arbitrary to support a conviction on one charge on the basis that the evidence showed guilt of another charge. Here the deception in terms of what the prosecuting attorney did say and do is justified on the ground that he might have taken the same position and supported it on different grounds. But the grounds actually used by the prosecuting attorney had the effect of halting inquiry. The grounds now offered by the Government would

have opened up the inquiry and resulted in a full and fair hearing.

D. PROSECUTION TACTICS CIRCUMVENTING DEFENSE PRESENTATION OF GERSH AND HIS RECORDS

Petitioner reiterates to this Court that his conviction (on a recommendation of leniency) was due to the lack of a full defense. That in turn was due partly to the refusal of the trial judge to reopen the proceeding (Pet. 32-35.) But as set forth in the petition for certiorari (pp. 4-5) there is also a substantial question of prosecution misconduct—

> "(c) In the prosecution's tactics to circumvent the presentation of Gersh or his bank records at the second trial: by subpenaing Gersh and releasing him from subpena, without notice to defendant, while defense was putting on its case, by failing to call Gersh in rebuttal as at the first trial, and by objecting to defense counsel's effort to reopen the case to call Gersh to identify his bank records."

1. The Government's brief devotes several pages (p. 10 et seq.) to justifying its failure to call Gersh. In this case the petition did not assail the failure to call Gersh as error per se. It was not necessary to do so. It is background for testing the other actions complained of: The fact that the Government not merely failed to call Gersh, but first subpenaed and then released him without notice to the defense that the Government had decided not to call Gersh; the prosecution's statements and maneuvers to avoid identifying the corroboratory records (see point C); and its opposition to the defense effort to call Gersh. The prosecution's own failure to call this key witness required scrupulously fair dealing with the defense to avoid prejudice in regard to the matters where Gersh and his bank records would have corroborated petitioner. (Pet. p. 32.)

a. But what is the prosecution's reason for failure to call Gersh? Not to cut down on the witnesses cluttering the trial. The prosecution paraded numerous witnesses to prove facts admitted by petitioner. Yet the witness who was not called was the critical witness,—who was hostile to petitioner on the important issues (although he corroborated petitioner to the extent that he was compelled by his bank records.)

b. A smoke screen is laid down with this superficially persuasive and illuminating explanation (Govt. Br. 10), that the prosecution offered Gersh in rebuttal at the first trial and not at the second because at the first trial there were six defense witnesses in chief in addition to petitioner, while at the second trial there was only one defense witness in addition to petitioner.

There were no significant differences in the two trial records which could account for the release of Gersh from subpena. The six defense witnesses at the first trial were:

(1) Jack Kent—who was also a witness for defendant at the second trial.

(2) (3) Vance Hammerly and James A. Oligny. Each was a Government witness at both trials. Each witness was recalled by the defense at the first trial to establish certain facts, and the same facts were established by the defense at the second trial on cross-examination. Mr. Hammerly established that Mr. Raymond Worthy[4] was the salesman for Rathjen's who handled petitioner's account (R. 12992, p. 459; R. 14109, pp. 310-311). Mr. Oligny completed the prosecution's record of liquor shipments to petitioner by testifying concerning a shipment of 100 cases Gallagher and Burton whisky (R. 12992, pp. 408-415; R. 14109, pp. 104-9).

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[4] It is not clear why the Government brief refers (p. 6, fn. 1) to the fact that Mr. Worthy died in 1949, prior to the first trial. Is the Government implying that otherwise Mr. Worthy would have been called in rebuttal although Gersh was not?

(4) August P. Brady—an employee of the Bureau of Internal Revenue and a Government witness who was recalled by the defense at the first trial to trace certain whisky shipments in the Government's exhibits (R. 12992, p. 416).

(5) Frank Mayer—whose testimony at the first trial prosecuting attorney Schnacke was willing to stipulate at the second trial. (R. 456.)

(6) Raymond E. Reitman—who gave three pages of testimony at the first trial (R. No. 12992, pp. 399-402), stating that he had been subpenaed by the Government, but that he had neither knowledge nor records of the whisky shipment made by his company.

The Government cannot be serious in claiming that Mr. Schnacke chose to omit Gersh in rebuttal because the second trial would lack the testimony of Reitman—a witness with absolutely nothing to contribute.

2. The essence of the matter seems to be this,—that previously the prosecution recognized that the case would turn, in the last analysis, on whether the jury believed Gersh or the petitioner. Underlying the indictment of petitioner was a belief in Gersh rather than petitioner on the points in issue. The choice between them was the crux of the trial. The court of appeals reversed at the first trial in order that the jury might consider the full controversy, including relevant evidence discrediting Gersh as well as his testimony.

Mr. Schnacke concluded that a full record was not favorable to a conviction, since when Gersh corroborated petitioner, he was compelled and reinforced by his bank records, whereas when Gersh contradicted defendant he could be discredited through the evidence which was excluded at the first trial. Accordingly Mr. Schnacke did not prepare the full record envisaged in the opinion of the court of appeals. Instead he determined that the best

chance of conviction lay in a truncated record and the spurious arguments made possible thereby. And by trick and maneuver he sought to avoid explaining the amounts and purposes of the cash transfers to Gersh and to induce the jury to believe that no cash transfers had occurred.

3. The Government brief does not answer the contention, as to notice, strongly emphasized in the petition (pp. 28-30),—that even assuming the Government was not bound to call Gersh the course of fair dealing in this case required that the Government notify the defense that it was releasing Gersh from subpena and would not call him in rebuttal. See Circuit Judge Maris, in *United States* v. *Peterson*, 24 F. Supp. 470 (E.D. Pa.). The proper course of the prosecution is reflected not only in the *Peterson* and *Sullivan* cases cited in the petition but also in *Benton* v. *United States*, 188 F. 2d 625 (C.A. D.C.). There the Government decided not to call a witness it had subpenaed but the "Government at the close of its case tendered the mother to the defendant if he wished to call her." (188 F. 2d at 626.) (Defendant declined to call her when so tendered. Yet the court of appeals held that she was such a vital witness that the interest of justice required a new trial to consider her testimony.)

The Government argues that the prosecutor never said he would call Gersh in rebuttal (Br. 12). The defense anticipated that Gersh would be called in rebuttal in view of these facts: Gersh was the real witness against petitioner. That he would be called at the second trial was the natural sequence to the previous judgment of the court of appeals which reversed in order to have a more complete record on the question whether Gersh or Wolcher was telling the truth. The prosecution had subpenaed Gersh. And Mr. Schnacke had announced that there would be rebuttal witnesses (R. 455). The Government brief offers no credible explanation as to why Gersh was first subpenaed and then released, or why the prosecution an-

nounced it would have rebuttal witnesses and did not call any.

The Government brief further contends (p. 12) that the record does not show that the prosecution deliberately misled defense counsel. That is a question of Mr. Schnacke's subjective intent. What the record does show is that the prosecutor did not live up to the standards set both by and for prosecuting attorneys in the cases cited above. That standard is this,—that in order to assure a complete trial, a prosecuting attorney with control over an important witness notifies the defense that he is available, if desired, before releasing him. This standard is *a fortiori* applicable where it was reasonably to be anticipated, in the absence of notice to the contrary, that the witness would be called by the prosecution.

The Government brief gives no explanation for the prosecutor's failure to notify defense counsel. Petitioner submits that by Gersh's absence the prosecution hoped to relieve itself of the burden of proving the real issues as to why the cash was sent to Gersh in the light of the evidence excluded at the first trial.

The Government suggests that defense counsel could or should have requested that Gersh be called by the court (Govt. Br. 12). But this was appropriately the function of the Government attorney, in order to achieve a complete record. Thus *Litsinger* v. *United States*, 44 F. 2d 45, 47 (C.A. 7th) refers to the "well-recognized rule * * * which permits the trial court to call and examine a witness at the request of the government's attorney".

In *Young* v. *United States*, 107 F. 2d 490 (C.A. 5th), the court specifically approved the procedure whereby the prosecution has the critical witnesses present in court, "that in the event they are not used by the prosecution they may be available to the accused or court. * * * If (the accused) declines, then the right of the Court to call them arises, to be exercised according to his own discretion in aid of

truth and justice and not on motion of either side." (P. 494.)

Under this approved procedure a prosecuting attorney who does not wish to call or sponsor a salient witness makes him available to the court. If called by the court, both sides are allowed cross-examination and impeachment. *United States* v. *Lutwak,* 195 F. 2d 748, 754 (7 Cir.), affirmed as to other questions, *Lutwak* v. *United States,* 344 U.S. 604.

This doctrine is indicative of how the prosecuting attorney might have acted if he had been, as the Government now suggests, unwilling to call Gersh himself but basically interested in presentation of a full record. No such step was suggested or taken. What Mr. Schnacke wanted was a partial record and the spurious presentation made possible by an incomplete record.

4. The Government argues (Br. 12) that the defense should have subpenaed Gersh as its witness to dentify the bank records. That begs the question and assumes that there was no misconduct whatever on the part of the prosecution, and that defense counsel was culpable for failure to anticipate that the prosecution would circumvent identifying the bank records, and would release Gersh from subpena without notice to defense.

This is not a case where the defense counsel deliberately slept on his rights. This is a case where the defense counsel was surprised and misled by the prosecution, by the Government's release of Gersh from subpena without making him available to the defense or the court, by its denial of knowledge of the corroboratory bank records and of their materiality, and by its opposition to giving defense a brief delay to call Gersh.

5. In any event defense counsel was in fact ready to call Gersh and moved to do so as soon as he learned that Gersh was in San Francisco. There is no basis on which

the Government can or does defend Mr. Schnacke's bitter opposition to petitioner's request to call Gersh in order to identify the bank records. This was an integral part of the prosecution's unfair tactics assailed by the petition. Otherwise the previous denial of knowledge concerning the bank records would have been useless.

The Government now says that at 10:30 a.m. the prosecuting attorney recognized the obvious fact that Gersh's bank records were highly material but felt that they should have been presented through Gersh. (Govt. Br. 16-17.) Then how could the prosecutor object to the 1 p.m. request of defense to call Gersh? That there had been a short recess, and that time had been set for closing arguments, is a slender reed on which to rest a man's liberty. The case had not yet been presented to the jury. The defense attorney had learned during the recess that Gersh was in fact in San Francisco, and Mr. Schnacke confirmed this. It was therefore not significant that defense might have subpenaed Gersh earlier. The answer is plain,—the prosecutor was not only unwilling to call Gersh as his own witness, he resisted in every way he could the possibility that Gersh would be a witness at all.

Having previously released Gersh without notice to the defense Mr. Schnacke now vigorously opposed the request of defense counsel to call Gersh as a witness to identify the bank records. He even went so far as to say (R. 471): "I don't see that contract [account record?] has any connection with this case."

Mr. Schnacke consistently, and without regard to fair dealing, furthered his approach that the best way to obtain a conviction was to keep the corroborating bank records out of the case altogether; to avoid Gersh's presence in the witness chair; and to present the case to the jury with an abbreviated record, and an attack on petitioner's apparently unsupported testimony.

E. DENIAL OF CONTINUANCE SOUGHT FOR FULL DEFENSE

The denial of full defense results from a combination of the improprieties already discussed and abuse of discretion in the ruling of the trial judge made in the situation created and aggravated by the prosecution's misconduct. Petitioner has necessarily devoted more space to discussion of the prosecution's misconduct, largely because of the number and nature of incidents and maneuvers involved. But this Court must be equally concerned with the action of the trial judge in refusing a continuance so that the defense could call Gersh to identify the bank record. In one view of the case that became the critical point in the trial since it was still possible at that time to obviate the antecedent mischief.

The accepted course of judicial proceedings is to extend liberal opportunities for a full defense. Instead of denying the application to call Gersh, it would have been more appropriate for the trial judge to have initiated the suggestion to defense, when the bank records first came under discussion, that in his view the defendant's case would be more fully presented if Gersh were called as the witness. Compare *United States* v. *Fox*, 95 F. Supp. 315, 319 (E.D. Pa., 1951.)

Although it was the prosecution's misconduct that established conditions conducive to the judge's erroneous rulings, nevertheless at a critical moment the trial judge failed to observe the paramount standards of justice and vigilance in assuring liberal opportunity for a full defense. That is a dominant standard which this Court should emphasize for the guidance of trial courts. The undoubted discretion of the trial judge nevertheless has bounds. And in this case the bounds were exceeded.

The Government's brief notes (p. 24) that the judge did not say that the records were material. The judge said he would have granted the motion had it been made earlier (R. 473), which clearly assumed the materiality of the evidence. It is clear from the record that the task of de-

fense counsel was not to persuade the judge that the evidence was material. What the court said was that the time was too late (R. 472). He could not see why the application had not been made earlier (R. 472). Mr. Friedman explained that he had not anticipated any difficulty in establishing documents identified at the previous trial by the Government's own witness, and that he had only learned during the recess that Mr. Gersh was in fact in San Francisco, a fact which Mr. Schnacke confirmed. (R. 468-9; 471.) No, that was no excuse; the motion was too late. That is an unreasonably harsh standard. It does not reflect that vigilance to assure liberal opportunity for a full defense which is the cornerstone of judicial administration of criminal proceedings.

F. CHARGE TO THE JURY

The Government argues that the charge to the jury was "correct on the facts of this case" (Br., p. 26.), and refers to the fact that admittedly gross income was higher than reported by the defendant.

The charge riveted the jury's attention on whether or not it believed defendant's testimony, and distracted it from the prosecution's burden. Defendant admitted that gross income was higher than reported. This did not diminish the Government's burden of proving beyond a reasonable doubt that net income was higher than reported and that defendant wilfully understated true net income and tax thereon.

In *United States* v. *Raub*, 177 F. 2d 312 (C.A. 7th) all the facts were admitted. The charge emphasized the major issue. This was considered to reduce the prosecution's total burden, notwithstanding that each element thereof was correctly stated in other portions of the charge. This was a denial of substantial rights and reversible though not objected to below.

The instruction concerning petitioner's testimony should have been in the focus of determining whether the prose-

cution had met its total burden—that in making that determination the jury should take defendant's explanation into account and should also consider and weigh all the other testimony and circumstances, including that of the prosecution's own witnesses concerning the extreme whisky shortages and the need for black market purchases to obtain supplies.

Balman v. *United States*, 94 F. 2d 197 (C.A. 8th) is not distinguishable, as the Government suggests, on the ground that the issue of wilfulness was withdrawn from the jury's consideration. In Balman as in this case the issue of wilfulness was left in the case, but the jury was erroneously told to determine that issue upon its belief *vel non* in defendant's testimony and explanation.

In this case the trial court's error is sought to be excused by the Government, on the basis of "the facts of this case;" and by the court of appeals on the ground that although the term defendant's "story" was not a "happy" choice, the charge was saved as a whole (Pet. 5a.). In contrast, the court of appeals reversed in the *Balman* case even though it believed the error was "inadvertent." "The charge in its entirety was otherwise exceptionally clear and appropriate. * * * Nevertheless, we feel it to be important that no precedent should be indulged which may possibly lead to laxity of statement in a matter so imporant to criminal proceedings." 94 F. 2d at 200.

G. THE ALLEGED FAILINGS OF DEFENSE COUNSEL

Threaded through the Government's brief is an attempt to justify the tactics of the prosecuting attorney by alleging failings of petitioner's counsel. The essential fact, that justice miscarried because of the overreaching and deception of the law officers of the Government, can not be blamed on defense counsel.

1. The Government contends that the summation could not have been prejudicial to petitioner since it was not complained of at the trial. (Br. 23.)

Where the defendant makes the serious charge of prejudice resulting from the deception of the prosecuting attorney, it lies ill for the Government to argue that defendant is barred because his trial counsel, taken by surprise and rebuffed in his efforts to prove what he had no reason to suspect the Government would deny, did not take exception to a summation based on a record rendered inadequate because of the prosecution's misconduct.

Mr. Friedman who had made such strenuous efforts to introduce the corroborating evidence was well aware of the substantial damage being done to petitioner's cause. But he did not perceive how he could prove misconduct since Mr. Schnacke had already disclaimed any knowledge of the bank records.

Mr. Friedman would have objected vigorously to the summation if Mr. Schnacke had been as candid in the trial court as is the Government's brief in this Court and conceded that he did have knowledge of the bank records and had examined them when he studied the record of the earlier trial.

2. The Government's references to lack of objection below fail to take account of Rule 52(b) of the Federal Rules of Criminal Procedure which provides that the Court will reverse for an error not made the subject of objection below where substantial rights are affected.

Rule 52(b) is particularly applicable where there are several errors cumulating in substantial prejudice and unfair treatment of the accused. See *United States* v. *Cumberland*, 200 F. 2d 609, 611 (C.A. 3d):

> "But where, particularly in a criminal case, several errors appear which in the aggregate contain a potential of substantial damage to the accused, the policy of sound and time saving trial administration which would penalize failure to point out error below, may have to yield to more important considerations of making sure that the accused has been treated fairly.

We think this is such a case. The likelihood of injustice seems sufficient to require a new trial."

3. In some cases the defendant is in the position of opening on appeal a point totally different from those raised below. In this case, however, the points presented in the petition are integrally interrelated with the questions consistently presented below. And in one respect it is fair to say that the refusal of the trial court to permit the defense to call Gersh to the stand to identify the bank records was the critical error in the case. The prosecution's tactics earlier in the day would have been rendered nugatory. The prosecution's summation would not have been possible. And the rule of widest opportunity for a full defense would have been vindicated.

4. The Government asserts that Mr. Friedman learned over the weekend that Gersh would not be called, and suddenly developed the idea of introducing the records as a new tactic. (Br. 14-15.). These statements are unwarranted and inaccurate. Mr. Friedman did not know that Gersh would not be called until the prosecution rested without calling him. Mr. Friedman had previously expected the identification of the bank records to be relatively routine and brief. He did not anticipate and could not reasonably have anticipated the tactics which were actually pursued. He did not foresee that this evidence would be as critical as it in fact became,—under Mr. Schnacke's plan of summation. He wanted this corroboration to be tangible and before the eyes of the jury. But he never anticipated that the Government would dispute the part of defendant's testimony which was corroborated by the bank records known to the Government officials.

5. The Government brief (p. 13), suggests that petitioner's counsel should have asked to call Gersh in the morning, when the Government rested. Defense counsel believed that he was remediless because he had no constructive motion to put before the court. When he learned dur-

ing the recess that Gersh, who lived in Chicago, was in fact in San Francisco, then he was able to apply to the court for a subpena with the assurance that this would not entail a long delay.

Perhaps defense counsel should have been more aggressive in the morning and asked for a continuance until he located Gersh regardless of delay involved. But certainly that is not a reason for the prosecution to object to, or the court to overrule, a request for reopening and subpena made so promptly thereafter.

Defense counsel was taken by surprise, first by the denial of knowledge and materiality of the Gersh bank records and then by the abrupt end of the case without Government rebuttal. He collected himself and acted as promptly as one taken by surprise could be expected to act. He acted before the case went to the jury. It cannot be argued that he delayed until after the jury's verdict. Under most difficult and unexpected circumstances he was seeking a fair trial for the petitioner. So much cannot be said for the law officers of the Government.

CONCLUSION

Petitioner stands now at the bar of this Court asking, in justice, that he be given a trial at which he will be acquitted or convicted on the basis of the facts fully and fairly presented.

The Government's opposition is insubstantial and studded with makeweights and diversions.

It is in the light of the requirements of substantial justice that the questions raised in the petition for certiorari are believed to merit review by this Court.

Respectfully submitted,

HAROLD LEVENTHAL
LEO R. FRIEDMAN
Attorneys for Petitioner

August, 1955.

SEP 15 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 77

LOUIS E. WOLCHER, *Petitioner*

v.

UNITED STATES OF AMERICA

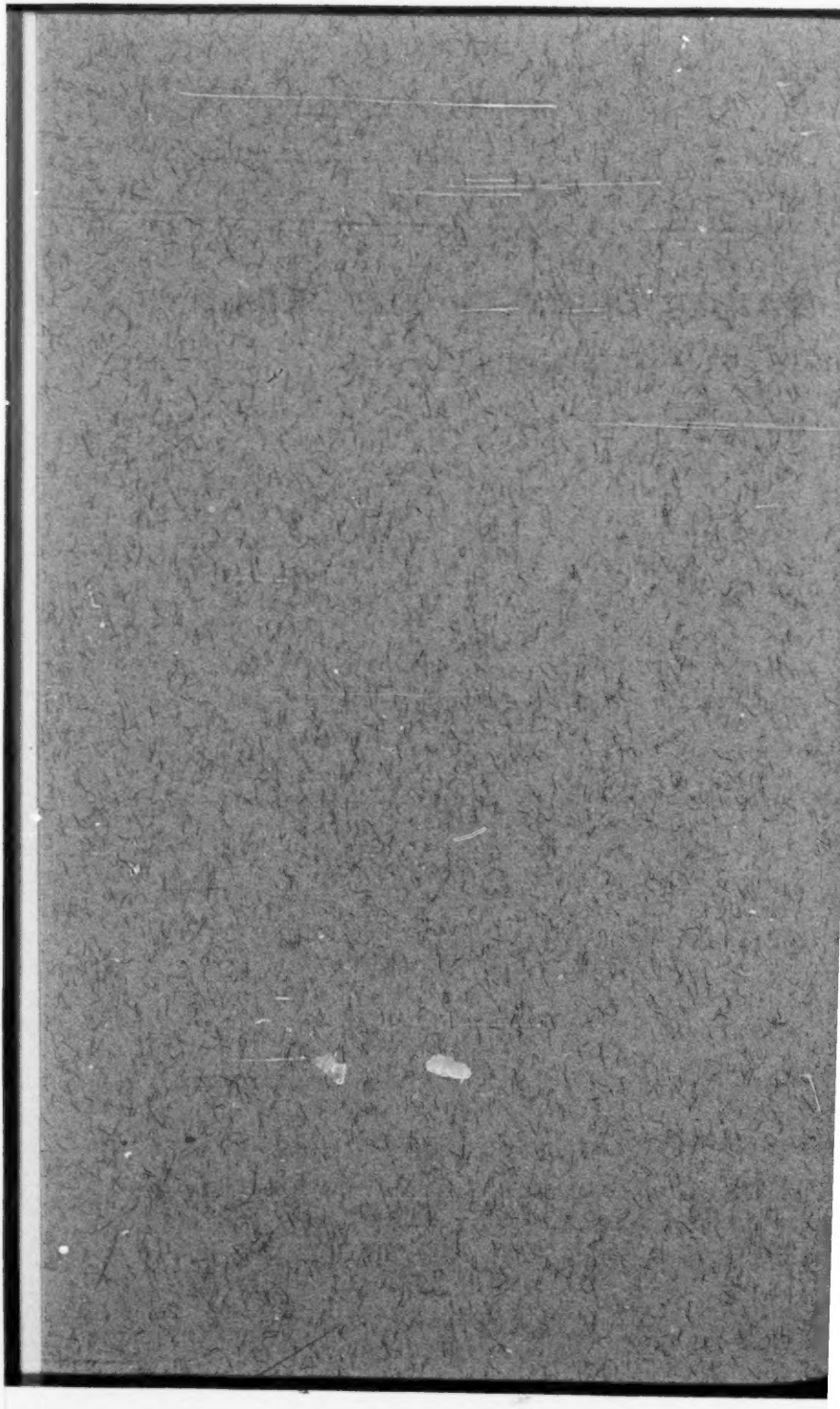
On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTARY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

HAROLD LEVENTHAL
LEO R. FRIEDMAN
Attorneys for Petitioner

September, 1955

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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SUPPLEMENTARY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

The reply brief notes our regret that the Government did not concede that a new trial was in the interest of justice and instead interposed technical contentions.

We respectfully suggest to the Court the parallel between the *Wolcher* case and *Kretske* v. *United States*, No. 91, October Term, 1955. Our attention has just

been called to the Government memorandum in the *Kretske* case, filed by the Solicitor General, and by Mr. Warren Olney III, Assistant Attorney General, and other attorneys of the Criminal Division. The cognizance of the Criminal Division pertains to criminal cases other than criminal tax cases.

The Government's memorandum in the *Kretske* case consents to the granting of the petition for certiorari and remand for a new trial. It points out that the "government, we now know, gave erroneous information to the court and the jury." This erroneous information was given by the prosecutor in presenting Lafitte's testimony that he had worked for the Government in an investigatory capacity abroad during a recent 10-year period, and in foreclosing cross-examination concerning such activities by objecting on the ground of public interest.

In the *Wolcher* case prosecuting attorney Schnacke gave misleading information when he said that he had no knowledge of the Gersh bank records, bank records which corroborated petitioner's testimony in significant measure. "I don't have any knowledge of those. I wasn't here at the first trial. I don't know anything about it, about any part of it." (R 467.) Now the Government in effect concedes that Mr. Schnacke examined the bank records when he read the record of the first trial in preparing for the second trial. (Govt. Br. 16.) It was plain that Mr. Schnacke did not have, and was not being asked about, any personal knowledge of the records in the sense of being able to authenticate them as records originally sent or received by him. He would not have had such personal knowledge even if he had been at the first trial. He was obviously being asked about the knowledge he had gained of the records as

an assistant United States Attorney. He disclaimed any such knowledge.

His statement as Government counsel was plainly misleading, and it was critically misleading. It enabled him to halt the immediate defense attempt to identify the bank records, and later to oppose the application that defense counsel made upon learning that Gersh was in the city. It wrongfully deprived defense counsel of a basis for protesting when the prosecutor later tellingly argued to the jury, on a spurious basis, that petitioner's testimony of cash mailings to Gersh was a "fantastic" fabrication, resting on petitioner's "unsupported word."

In both *Kretske* and *Wolcher* cases the prosecutor foreclosed cross-examination through his objections. Mr. Schnacke was successful in foreclosing cross-examination of Mr. Appling, special agent in charge of the Wolcher investigation, by objecting on the ground of lack of materiality. The Government's brief now concedes materiality. Only with the bank records out of the case was Mr. Schnacke able to assail petitioner's testimony of cash transfers to Gersh as a fantastic and unsupported fabrication.

In both the *Kretske* and the *Wolcher* cases, the Government gave "erroneous" information—in one case through the testimony of a Government witness, in the other through the statement of its counsel. In each case the impact of the erroneous information was cumulated by objections foreclosing cross-examination, and by summations which were spurious in fact though in accordance with the curtailed record as made.

In the *Kretske* case the dereliction was that of a witness who imposed upon the prosecutor as well as

the court. In the *Wolcher* case the dereliction was that of the Government's own attorney. In the former case the Government has recognized that justice is paramount to technical rules; in the case at bar, the Government has chosen to interpose technical objections. It is not difficult to understand why the Government would be less ready to admit error that reflects on its own trial counsel. It is not difficult to understand why the Government would exhaust every possible means of defending its own counsel, using technical contentions if necessary. But the accused must be protected from the imposition of Government counsel no less than from the imposition of a witness. And the Government's own involvement suggests that this Court should be even more alert to provide the needed remedy.

In the interest of justice and to insure that tax cases, like other criminal cases, are prosecuted in accordance with the high standards set for Government prosecutors, the petition for certiorari should be granted.

Respectfully submitted,

HAROLD LEVENTHAL
LEO R. FRIEDMAN
Attorneys for Petitioner

September, 1955

IN THE

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UNITED STATES OF AMERICA, *Respondent*

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PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR CERTIORARI

This petition for rehearing is filed on the basis that the ruling of the court of appeals upholding the charge to the jury is in conflict with the opinions of other circuit courts of appeals. Although this point was preserved and briefly stated in the petition for certiorari, it was subordinated to the issue of prosecution misconduct, an issue which required a painstaking collation of

the records on two trials in support of the contention that the prosecutor gave misleading answers and knowingly argued his summation to the jury on a basis spurious in fact. By focussing solely on the point of the instruction, this petition for rehearing permits the requisite analysis, both of the opinions of other courts of appeals and of the facts and ruling in this case, showing a conflict of circuits.

In the charge to the jury, after going through the generalized instructions, the trial judge came down to the issues in this case and charged (R. 483):

> "So that in my opinion brings the issue of the case down to a very simple (question), and that is this—that since the Government has proved and the defendant has admitted receiving the cash over ceiling prices, *the issue is whether you do or do not believe the testimony and the story told by the defendant in the case.* If you believe his story, then you should return a verdict of not guilty. If you are convinced beyond a reasonable doubt that his story should not be believed, then you are justified in returning a verdict of guilty." (Emphasis added.)

The ruling of the court of appeals upholding this charge is in conflict with the opinions of the Court of Appeals for the Eighth Circuit and the Fifth Circuit. *Balman* v. *United States,* 94 F. 2d 197 (8 Cir. 1938); *Ward* v. *United States,* 96 F. 2d 189 (5 Cir. 1938); *Lambert* v. *United States,* 101 F. 2d 960 (5 Cir. 1939); *Boatright* v. *United States,* 105 F. 2d 737 (8 Cir. 1939); see also *Demetree* v. *United States,* 207 F. 2d 892 (5 Cir. 1953).

The principle applied by these courts in the opinions cited is that such an instruction, which focusses on whether or not the jury believes in defendant's account explaining the incriminating circumstances, operates in fact, though not in terms, to place the burden of proof on the defendant. The vice of such an instruction is that it tends to divert the jury's attention from their proper function of making a determination on the basis of all the evidence in the case, appraising the negative as well as the affirmative aspects of the Government's evidence, as to whether such evidence establishes guilt beyond a reasonable doubt. In short, the trial judge may not charge the jury to consider whether or not they believe in defendant's account, unless he first expressly charges that the jury is to determine whether guilt is proved beyond a reasonable doubt taking into consideration the prosecution's entire proof, not only the incriminating facts and circumstances but also the weaknesses and offsetting aspects of the testimony of the prosecution witnesses.

The court below followed a contrary course. It said that the Government's proof of defendant's unreported gross receipts "clearly established a prima facie case" and that "obviously in such condition of the record he [defendant] had some explaining to do" (Pet. App. 4a).

This approach of focussing upon defendant's explanation of incriminating circumstances is what the other courts hold effectuates a transfer of the burden of proof and diverts attention from consideration of the prosecution's whole case. As the Court of Appeals for the Eighth Circuit put it, "while the possession of recently stolen property may call for an explanation, it is not necessary that the explanation should

come from the defendant, since it may arise from the evidence introduced by the Government itself," see *McAdams* v. *United States,* 74 F. 2d 37, at 40. The *McAdams* case was relied on in the *Balman* case, *supra.*

The *McAdams* case further points out that although the term "prima facie" case is frequently used to indicate that the Government has offered "sufficient evidence to take the case to the jury," yet "a prima facie case is unknown in criminal procedure" if it becomes the basis of placing the burden on defendant to establish a reasonable doubt of guilt. (74 F. 2d at 40.)

Balman reversed a conviction for possession of furs knowing they were stolen. The judge charged "it is for you to determine whether you believe the defendant's explanation of the trunk containing the furs being in his residence." The court pointed out that although possession of recently stolen articles was "prima facie evidence of guilt" and "would justify a finding that defendant knew they were stolen, they (the jury) were also entitled to know that the force and effect of that circumstance as bearing upon the guilt of the defendant was for them to determine *in the light of all the other facts and circumstances shown by the evidence.*" (94 F. 2d at 199.) (Emphasis added.)

Quoting from its opinion in the *McAdams* case (174 F. 2d at 41), the court noted that although the incriminating possession--

> "* * * might have justified the inference, it compelled no finding to that effect, *even though he* [*defendant*] *failed to give a satisfactory explanation.*" (94 F. 2d at 107.) (Emphasis added.)

In *Ward,* the court held that even though defendant's possession of the tax-unpaid containers of whiskey made a prima facie case, it was error to charge

the jury so that in effect the jury was to determine whether or not they believed defendant's explanation. See 96 F. 2d at 192:

> "The court should have modified the charge as given to advise the jury that while proof of the possession of whiskey, in tax-unpaid containers standing alone made out a prima facie case, *yet if upon all the evidence* the jury had a reasonable doubt as to whether the possession was for a prohibited or nonprohibited purpose, they should acquit him." (Emphasis added.)

The other cases emphasize the vitality of the principle applied by those circuits and the conflict with the ruling below. In the *Lambert* case, defendant was indicted for selling and conspiring to sell narcotics. The judge charged (see 101 F. 2d at 964):

> "On the other hand, if you feel, after weighing all the evidence that has been presented by both sides, that that of the defense outweighs or is equally balanced with that offered by the Government, after applying the law as given to you by the Court, then you should acquit, but if it fails to balance or equal that offered by the Government and there is not that reasonable doubt about which I have spoken, then it is your duty to find the defendant guilty as charged."

Without any assignment of error this charge was held erroneous (p. 964):

> "Instead, in short, of requiring the Government, by its evidence, to establish defendant's guilt, beyond all reasonable doubt, thus putting the burden on it to convict defendant, the charge required the defendant, by his evidence, to raise a reasonable doubt in his favor, and thus put upon him the burden of acquitting himself as innocent."

In the *Boatright* case, the trial judge, after charging on the basis for conviction in view of the evidence of the Government, charged that, if on the other hand, the jury should find that defendants did not devise a scheme, or did not make false representations, or did not intend to obtain money thereby, it was the jury's duty to acquit. This was held an erroneous shifting of the burden of proof.

Although the Government's proof of unreported gross receipts certainly made out a prima facie case against petitioner sufficient to go to the jury, such proof is not equivalent to a showing of even gross income (receipts less cost of goods), much less net income (gross income less other deductions). The charge of the trial judge and the opinion below, in conflict with the other circuits, erroneously diverted the jury's attention from its function and duty of considering the offsets and weaknesses in the Government's direct proof (set forth for convenience in the Appendix to this petition). These constituted a basis, without considering petitioner's account, that would have justified the jury in finding that although black market violations had been clearly shown tax evasion had not been established beyond a reasonable doubt.

The Government's evidence established unreported over-ceiling receipts on 3,400 cases of whiskey sold by petitioner in the black market, but the evidence also showed that these sales were out of a total of 5,138 cases of whiskey purchased by petitioner, that whiskey was sold by petitioner *at ceiling* to bars in which petitioner or his relatives had an interest. The missing link, that petitioner's wholesale purchases were not at ceiling as assumed by the prosecution, but were in the black market requiring petitioner to make cash payments above ceiling, was a probable inference, and at

the very least a permissible inference, from the Government's own evidence, as set forth in the Appendix. (This is supported by Mr. Owens' testimony, and also by the testimony of the regularly established wholesalers that they were not able to obtain supplies at ceiling prices, and had been unable to supply petitioner for his own taverns.)

The charge as formulated was silent on the weaknesses and offsets disclosed in the prosecution's proof. So far as the prosecution's own case was concerned the charge was focussed on the proof of over-ceiling receipts, without calling the jury's attention to their function of considering the over-ceiling receipts in the light of all the facts disclosed in the prosecution's proof. Because over-ceiling receipts were established the judge focussed the charge on whether or not the jury believed in the defendant's story. That charge by ignoring and indeed diverting attention from the prosecution's proof as a whole had the impact of shifting the burden to defendant.

The court of appeals below commented that the jury were charged to acquit if they believed petitioner's "story." As the court noted the choice of this term "may not have been a happy one" (Pet. App., p. 5a), and obviously its derogatory connotations increase, if anything, the burden upon petitioner.

The court of appeals upheld the charge on the ground that it did not instruct the jury to disregard the testimony of Government witnesses tending to corroborate defendant's account. That ruling is at variance with those of the other courts of appeals in two major respects: First, the judge must do more than fail to prohibit consideration of all testimony of the prosecution witnesses. He must direct the jury's attention to

its function of considering all of that testimony. The court of appeals below did not claim and obviously could not claim that the term "defendant's story" called attention in any way to the offsetting aspects of the Government's proof. Second, the judge must make clear to the jury that it must consider the weaknesses in the Government's proof as part of the Government's direct case. This is different from considering these as corroborating defendant's account. The error lies in focussing on the defendant's account rather than on the Government's burden on the basis of all the proof. The fact that the jury does not believe the defendant's account does not mean that the Government's entire proof establishes guilt beyond a reasonable doubt.

The gravity of focussing the jury's attention upon belief in defendant's story is underscored by another instruction that the jury might disbelieve all of a witness' testimony if they found any material part of it false (R. 479). That is a generally proper instruction. But in the setting of an improper focussing on defendant's testimony, it means that acquittal may be denied because of lack of belief in any material portion of defendant's testimony. So here, the prosecution asked the jury to find that defendant's account of sending large sums of cash to Gersh in the mail, in ordinary envelopes, without receipts, was a fantastic fabrication and "not a persuasive story." (Pet., pp. 21-22.) Assuming that the jury, being unaware of the documentary bank records corroborating these cash transfers by defendant through the mail, found this "story" unworthy of belief, that would under the charge have led to the conclusion that they disbelieved defendant's account and to a verdict of guilty.

The opinions establishing a conflict of circuits also establish that the error is not obviated by accuracy in

the general charges on presumption of innocence and reasonable doubt. Thus in *Ward* v. *United States, supra,* the judgment was reversed although the trial judge had correctly "charged upon reasonable doubt in general terms." (96 F. 2d at 192.) See also *Balman* v. *United States, supra,* pointing out that the error was "inadvertent" and "the charge in its entirety was otherwise exceptionally clear and appropriate," yet declining to indulge any precedent "which may possibly lead to laxity of statement in a matter so important to criminal proceedings" (94 F. 2d at 199).

In *Bihn* v. *United States,* 328 U.S. 633, this Court held that where the case against the defendant was a close one, manifold repetitions of the general principle of presumption of innocence would not outweigh the fact that on the crucial specific passage of the charge, there was substantial possibility that the jury would conclude that the defendant had the burden of explaining possession of stolen ration coupons.

CONCLUSION

This petition for rehearing and in due course the petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD LEVENTHAL
LEO R. FRIEDMAN
Counsel for Petitioner

November, 1955

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

HAROLD LEVENTHAL

APPENDIX

The Government called representatives from three liquor wholesale and distributing houses. Oligny of the George Barton Co. testified that it was impossible even for that established wholesaler to get whiskey from its trade sources (R. 108-109); Weiss of the Franciscan Co. testified that the larger distillers were decreasing allotments to such an exent that they were unable to carry on their business (R. 140); Vance Hammerly of Rathjen Bros. testified they were not receiving sufficient whiskey to supply their customers and they had to put their customers on an allotment basis, based on the average amount a customer had bought (R. 311).

Each of the tavern owners called by the Government testified that it was almost impossible to get whiskey (R. 165, 171, 176, 180, 190, 200, 209, 216, 228, 251, 260, 267).

The evidence of the Government's witnesses established that petitioner was not in the wholesale liquor business, or in the business of buying and selling whiskey in either case or carload lots, and had previously tried to get more whiskey for his taverns from the wholesalers who regularly supplies him, but in vain (R. 122, 139). This very fact was sufficient to raise a doubt as to whether petitioner could acquire the seven lots of whiskey without having to pay a bonus therefor, when licensed wholesalers could not do so.

Moreover Sy Owens, Government witness, who had been in the liquor business since repeal, testified that whiskey was not available in the San Francisco Bay area unless the purchaser had some conection through which he could get it, or unless he bought tie-in commodities at excessive prices, or unless he was willing

to pay an over-ceiling price. (R. 85-86.) Moreover he testified that some of the liquor received by petitioner from the East went to bars owned jointly by Owens and petitioner's relatives at ceiling prices, *without any payment over ceiling,* and that other liquor went to other bars in which petitioner had an interest. (R. 83-85.)

As to the Old Brook whiskey purchased through Salesman Worthy from Rathjen Bros., the ledger sheets of Rathjen's showed that the Gold Coast and Silver Rail taverns owned by petitioner were on an allotment basis which gave them a regular business allotment of not exceeding $600 per month; that they were on a C.O.D. basis; that in May, 1943, 500 cases of Old Brook whiskey was sold to the Gold Coast for $25,950 (R. 46) and this was not paid for on delivery but was paid off in four installments (R. 315, and Def's Ex. C and D). Hammerly also testified that Rathjen's only received one shipment of 1,000 cases of this Old Brook whiskey and 500 cases thereof were sold to the Gold Coast (R. 315). Grusenmeyer testified that when he received the money for the sales of this whiskey he deposited the Rathjen invoice cost in the bank and put the surplus in the safe and that Wolcher told him the differential was because he had to pay money over the ceiling price for the whiskey (R. 68).

In net effect, while the Government's evidence showed that petitioner received moneys over-ceiling on sales of whiskey in the black market, it also provided a basis for concluding that payments over ceiling had to be made in order to purchase these large quantities of whiskey. And it further showed that petitioner resold some of this whiskey at ceiling,—which meant that in

the total account of receipts and disbursements the petitioner's sales at ceiling would be losses (assuming purchases above ceiling) offsetting profits where sales were in the black market. Indeed the Government's own evidence showed that whereas 5,138 cases of whiskey were purchased by petitioner only 3,400 cases were sold in the black market.* In view of the evidence indicating that the purchases were in the black market, and that whiskey was transferred to some bars at ceiling, the Government's own evidence provided a basis for concluding that black market violations were clearly shown but that there was a reasonable doubt as to whether there was tax evasion.

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* These figures are from summation of prosecuting attorney, August 31, 1953, pp. 3-9, on file with this Court. The detailed supporting figures are spread throughout the record.